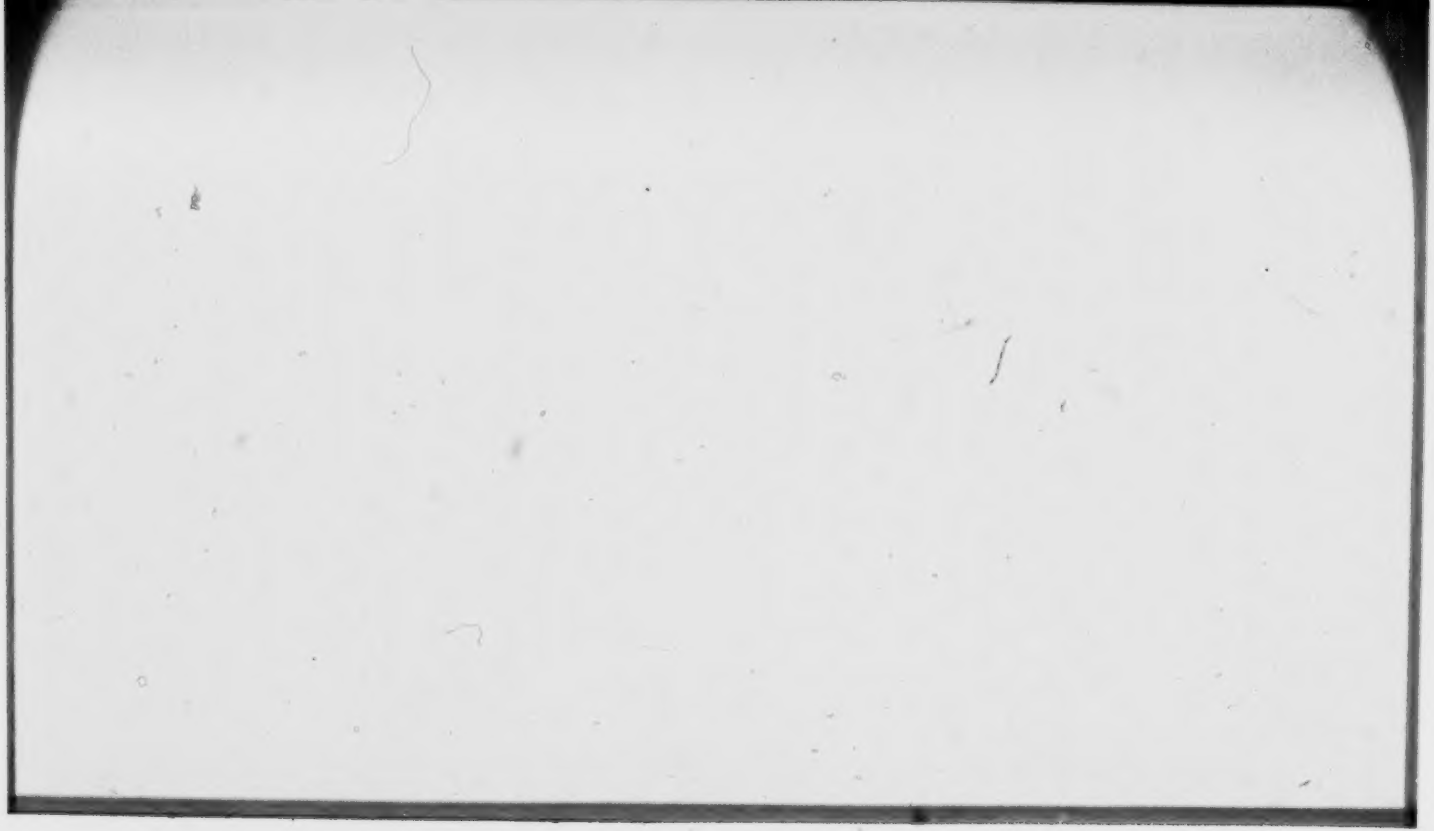

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Supreme Court of the United States.

Filed Jan. 13, 1902.

LOUISVILLE & JEFFERSONVILLE FERRY COMPANY, - - - - - - - - - *Plaintiff in Error,*

VERSUS

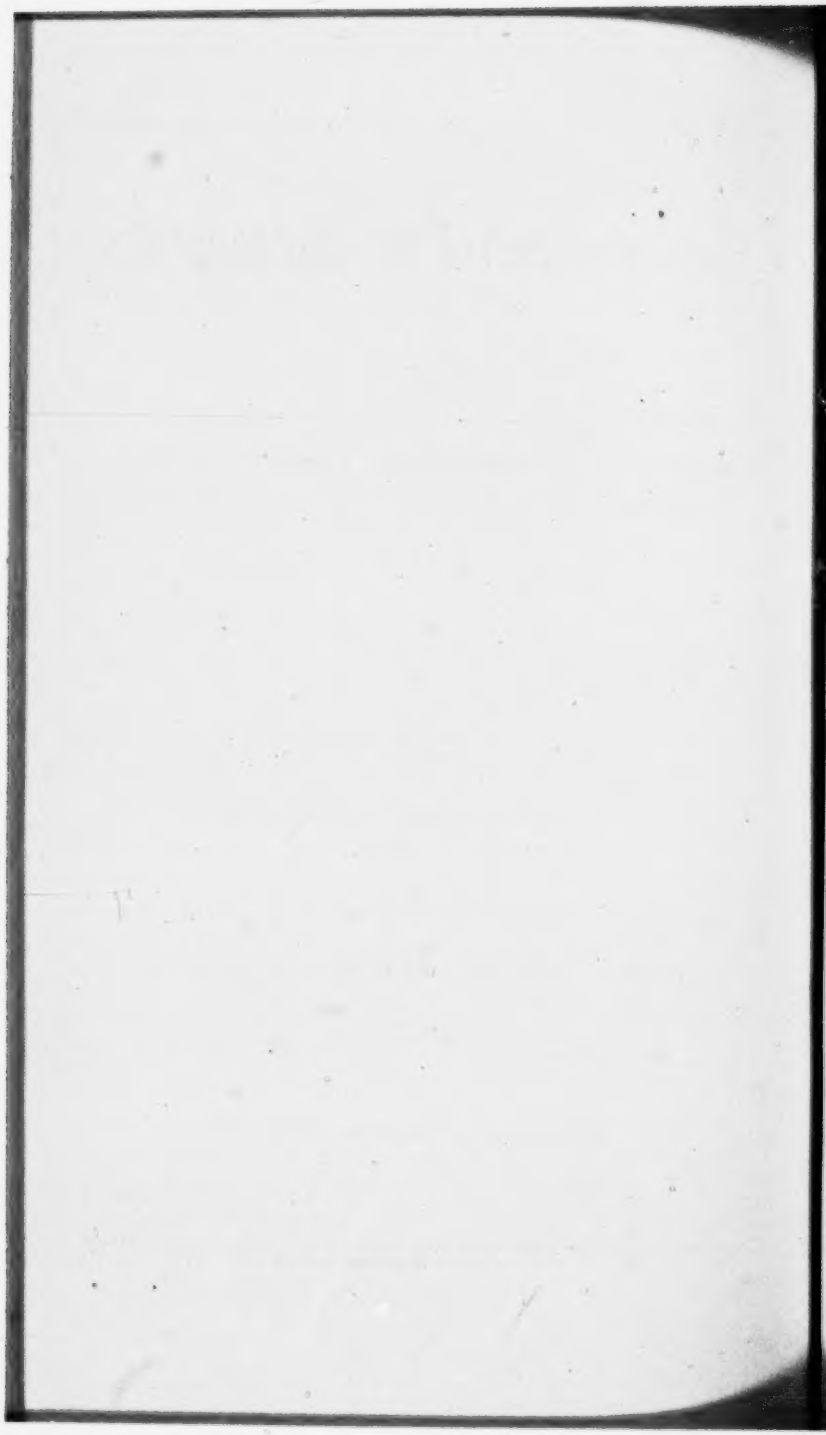
COMMONWEALTH OF KENTUCKY, - *Defendant in Error.*

In Error to the Court of Appeals of the State of Kentucky.

BRIEF FOR PLAINTIFF IN ERROR.

ALEXANDER POPE HUMPHREY,
Counsel.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE.



Supreme Court of the United States.

LOUISVILLE & JEFFERSONVILLE FERRY COMPANY, - - *Plaintiff in Error,*

VERSUS

COMMONWEALTH OF KENTUCKY, *Defendant in Error.*

Brief for Plaintiff in Error.

STATEMENT.

This is one of a series of cases, all heard together, involving the validity of a certain assessment made by the Board of Valuation and Assessment of the State of Kentucky against the Ferry Company. As all of the cases involve exactly the same question, only one record has been printed; a stipulation being on file that the other cases shall have the same judgment entered as may be directed in this case.

The Ferry Company is a corporation created by an act of the Legislature of Kentucky, of date March 29, 1869, entitled "An Act to incorporate the Louisville & Jeffersonville Ferry Company." In the appendix this act is given in full.

By the seventh clause of the act it is provided that the corporation may purchase from any existing ferry company or association any ferry-boats, wharves, and ferry franchises for any ferry or ferries between Louisville and Jeffersonville, and upon the purchase of all such existing franchises shall have the right to carry on and conduct a ferry or ferries between said cities.

By the eighth clause it is provided that such corporation may accept such boats and franchises, wharves and other property in payment of stock subscribed, and at such prices as may be agreed upon.

Under two grants from William Henry Harrison, then the Governor and Commander-in-Chief of the Indiana Territory, ferries were established in 1802 between Jeffersonville and Louisville, and another ferry was established under an act passed in 1820 by the Legislature of Indiana. These three ferry franchises, by regular devolution of title—sometimes by inheritance and sometimes by conveyances duly recorded—came to be owned in the year 1865 by certain persons, by whom the ferry was operated as a partnership. These persons, in 1869, conveyed to the corporation created above the boats then owned by the partnership, and the above mentioned ferry franchises. (R. 9, etc.)

The Ferry Company in the year 1887 made a contract with the Sinking Fund Commissioners of the city of Louisville (in whom, by the law of the State of Kentucky, is vested the ferry privileges of the city) by which the Ferry Company leased the ferry privileges, agreeing to pay for the ferry privileges and taxes $800 a year, and a wharfage fee annually of $400.

In the year 1893 the Assessor of Jefferson County assessed, for the State tax for the year 1894, the boats and other personal property of the Ferry Company, the boats being enrolled at Louisville. The Ferry Company had no real estate in Kentucky, and no other tangible or intangible property in Kentucky. (R. 7.)

The Ferry Company had certain land in Indiana, but had no intangible property there except the ferry franchise which we have above described.

Under these circumstances, the Board of Valuation and Assessment of the State of Kentucky ascertained what had been the net earnings of the Ferry Company up to September 15,

1893, for the year preceding that date. It then capitalized these net earnings; that is, it found what sum would, at six per cent, produce the said net earnings. This was found to be $121,050.00. From this sum the Board deducted $54,164.00, being the assessed value of the Ferry Company's tangible property in Kentucky and Indiana, leaving the sum of $66,886.00, as the value of the Ferry Company's "franchise."

The net earnings above capitalized represent the Ferry Company's gains for the carriage of persons and property between the States of Indiana and Kentucky.

Upon this sum of $66,886.00 there was levied the ordinary State rate of taxation, and for the amount so produced, $284.28, the Commonwealth of Kentucky brought suit against the Ferry Company, in the Franklin Circuit Court. It obtained a judgment for the full amount claimed, and the Ferry Company prosecuted an appeal to the Court of Appeals of Kentucky, where it was affirmed. The opinion will be found at page 19 of the Record.

From this judgment the Ferry Company has prosecuted this writ of error and has assigned the following errors:

Assignment of Errors.

1. The said Court of Appeals of Kentucky erred in deciding that the Board of Valuation and Assessment had the right to consider as part of the property or as entering into the value of the franchise of the plaintiff in error its right and franchise to operate a ferry from the State of Indiana to the State of Kentucky.

2. The Court of Appeals of Kentucky erred in deciding that the law under which the Board of Valuation and Assessment acted authorized it to take into consideration, in fixing the value of the capital stock of the plaintiff in error, the franchise which

has been conveyed to it, and which it owned for operating a ferry from the State of Indiana to the State of Kentucky.

3. The said Court of Appeals of Kentucky erred in deciding that the Board of Valuation and Assessment had the right, in fixing the value of the capital stock of the plaintiff or the value of the franchise of the plaintiff, to consider the earnings made by it in transporting persons and property from Kentucky to Indiana and from Indiana to Kentucky, the same being interstate commerce.

4. The Court of Appeals of Kentucky erred in deciding that the Board of Valuation and Assessment did not, in fixing the assessment of the plaintiff in error, violate the Constitution of the United States, particularly that clause thereof conferring upon Congress the right to regulate commerce between the States.

5. The Court of Appeals of Kentucky erred in deciding that the Board of Valuation and Assessment, in fixing the assessment of the plaintiff in error, did not violate the Constitution of the United States, and particularly the fourteenth amendment thereof, and did not deprive the plaintiff in error of its property without due process of law.

ARGUMENT.

The facts in this case are undisputed. The State filed its petition in the Franklin Circuit Court; the Ferry Company filed its answer, and to this answer the State interposed a demurrer, which was sustained.

The law under which the assessment was made by the State authorities is fully set out in the case of Adams Express Company v. Kentucky, 166 U. S. 172, and is printed in the appendix. The following is a statement from the opinion of the Court of Appeals:

"The judgments from which the appeals are prosecuted are for the franchise tax for the years of 1894, 1895, 1896, 1897, and 1898. The appellant is a corporation organized under a special act of the legislature passed in 1869. It purchased a ferry franchise which had been originally granted by the territorial authorities of Indiana, which authorized the original grantee to conduct a ferry business across the Ohio River from Indiana to Kentucky. By regular devolution of title, through descents and conveyances, appellant owns the rights thus granted. The franchise thus acquired authorizes the appellant to transport persons and property from Jeffersonville, Indiana, to Louisville, Kentucky. There was vested in the Sinking Fund Commissioners of the city of Louisville title to the ferry rights along the Ohio River within the boundaries of that city, and by an agreement with them the appellant became the owner of it. The appellant owned certain ferry boats which are enrolled at the port of Louisville. It owned certain real estate in the State of Indiana. It has paid its taxes upon its real property in Indiana and upon its personal property in this State. It has paid its taxes only upon its tangible property. It appears to have no income except the revenue derived from carrying persons and property from one side of the river to the other. The Board of Valuation and Assessment fixed the value of the franchise for the corporation as if it conducted all of its business in the territorial limits of the State of Kentucky, not deducting any thing from that value on account of the fact that it exercised the privilege of conveying passengers from Jeffersonville to Louisville by reason of its acquisition of privileges which were originally granted under the laws of that State.

"On behalf of appellant it is urged (1) that the franchise belonging to the corporation derived by it from the State of Indiana is an incorporeal hereditament, whose location is in the State of Indiana, and which can not be taxed by the State of Kentucky, nor can its value be included in any tax which the State of Kentucky endeavors to exact from it; (2) that as the revenues of the corporation are derived from the exercise of two independent franchises, one having its source from the State of Kentucky, and the other having its source from the State of Indiana, only so much of the value assessed as comes from the exercise of the Kentucky franchise can be taxed; (3) that as the franchise of the corporation is solely employed in the business of interstate commerce, the revenues from the exercise of that franchise are not sub-

ject to State taxation, nor can they be made the basis of an assessment for the purpose of State taxation; (4) that the assessments not having been made within the years during which the taxes were due and payable, the Board of Valuation and Assessment could not make the assessment—in other words, has no right to retrospectively assess."

Upon the last question stated above, viz., the right of the State Board of Valuation and Assessment to assess retrospectively, we are of course concluded by the judgment of the Court of Appeals. Therefore we need only consider the questions in this case as stated by Judge Paynter under the first, second, and third heads.

In the answer of the Ferry Company not only are the ferry franchises which it operates fully set out, but also the manner in which it obtained them. There is also set out fully the method by which the Board of Valuation and Assessment arrived at the result reached by it.

Among other allegations made by the defendant Ferry Company are the following:

"This defendant further says that all of its tangible property in Kentucky was assessed by the assessor of Jefferson County in the fall of 1893 for the State tax for the year 1894, and the defendant paid the said tax. The property so assessed by the Sheriff of Jefferson County consisted of all of the boats and other personal property of this defendant, the defendant having no real estate in this State.

"For the same year all of the real estate owned by this defendant in Indiana was assessed by the authorities of that State, and the defendant paid the tax thereon.

"The defendant had no intangible property except the franchise hereinafter described.

"The Board of Valuation and Assessment ascertained what had been the net earnings of the defendant up to September 15, 1893, for the year preceding that date. It then capitalized said net earnings at six per cent; that is, to have been such an amount as at six per cent would produce the sum of $121,050.00. From this the Board deducted $54,164.00, being the assessed value of the defendant's

property in Kentucky and Indiana, leaving the sum of $66,886.00 as the value of defendant's franchise.

"This defendant says that it is a ferry company engaged in the transportation of passengers and freight between Louisville, Kentucky, and Jeffersonville, Indiana, and other points in Indiana; that substantially its whole revenue is derived from interstate commerce, and its net returns upon which the above capitalization was made represent its gains from interstate commerce; that is, from the carriage of persons and property between the States of Indiana and Kentucky."

Also the following allegations:

"The defendant says that the only ferry franchises owned by it are those above mentioned, which were granted by the authorities of the State of Indiana.

"The defendant says it brought before the Board of Valuation and Assessment, before that Board had made its assessment final, the fact that its whole capital stock had been issued in consideration of the transfer of the said ferry franchises granted by the State of Indiana and attendant property, and showed that all its property had been assessed as above explained, and protested against any assessment being made upon its franchises as being beyond the jurisdiction of the said Board and outside of the territorial jurisdiction of the State of Kentucky, and not taxable in Kentucky; and it protested against the said Board making any valuation whatever of its capital stock, because all of its property had been once assessed, and any valuation made upon its capital stock would include alone these franchises and profits resulting to the defendant from engaging in interstate commerce; and the defendant further requested the said Board, if it should insist upon making a valuation upon its capital stock, to deduct therefrom the value of these franchises. The said Board refused to enter into the question of the valuation of the said franchise, granted by the State of Indiana, as aforesaid, and owned and operated by this defendant, and refused to regard the fact that the profits which were earned by this defendant came from interstate commerce.

"The defendant says that the State Board of Valuation and Assessment, in making the assessment sued on, has disregarded the Constitution of the United States, and especially the clause giving to Congress the power to regulate commerce between the States, and has also disregarded the

Constitution of the United States, and particularly the fourteenth amendment, in that it has included in its assessment for Kentucky taxation franchises derived from the State of Indiana and there exercised.

"The defendant says that the said Board of Valuation persisted, as above stated, in taking the net earnings of this defendant, capitalizing these earnings at 6 per cent, and fixing the value of its capital stock at this sum, and only deducting therefrom the value of its tangible property as assessed in Kentucky and Indiana; all of which is contrary to law and right, and in violation of the Constitution of the United States and the laws passed in pursuance thereof, and the said assessment is therefore illegal and void.

What is the nature of the Ferry Company's franchise granted to it in the State of Indiana?

The deed of cession of Virginia was of "all right, title, and claim as well of soil as of jurisdiction, which the said Commonwealth had to the territory or tract of territory within the limits of the Virginia charter, situated, lying, and being to the northwest of the Ohio River."

By the ordinance for the government of the Northwest Territory it was, among other things, in Article 4, provided:

"The navigable waters leading into the Mississippi and the St. Lawrence and the carrying places between the same shall be common highways, and forever free as well to the inhabitants of the said Territory as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax imposed or duty therefor." (Revised Statutes of the United States, 16.)

The compact between Virginia and Kentucky, approved December 18, 1789 (Ky. Stat. 1894, page 44), provided, by the eleventh article, as follows:

"Article 11. 7. That the use and navigation of the river Ohio, so far as the territory of the proposed State or the territory which shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United

States; and the respective jurisdictions of this Commonwealth and of the proposed State on the river aforesaid shall be concurrent only with the States which may possess the opposite shores of the said river."

In City of Newport v. Taylor's Executors, 16 B. M. 700, it is shown that Kentucky has never attempted to provide for the granting of a ferry franchise across the Ohio River, except from Kentucky to a landing in the State upon the other side of the river, and never for a ferry franchise from such State to Kentucky.

The question is learnedly discussed in this case, and there has never been any change in this policy.

It is again announced in Reeves v. Little, 7 Bush, 470; and the case in 16 B. M. above cited was affirmed by this Court under the name of Conway v. Taylor's Executor, 1 Black, 603.

So that it may be taken for the purposes of this part of our argument that to make up a ferry upon the Ohio River there must be, (1) the franchise granted by Kentucky to ferry from the Kentucky shore to the opposite shore, and a franchise granted by the State of Ohio, Indiana, or Illinois, to ferry from one of said States across the river to the Kentucky shore. These two franchises, like the two blades of a pair of scissors, are necessary to make up a complete ferry right.

That a ferry franchise is property is equally clear from the authorities.

In 2 Washburn on Real Property, pages 291–92, etc., it is said: "Among other incorporeal hereditaments is the franchise of conducting a ferry"; and in the same work (1st Vol., page 210) it is said that dower may also be claimed out of various species of incorporeal hereditaments which belong to the husband by inheritance, such as rights of ferry, rents, and the like.

In Stevens v. Stevens, 3 Dana (Ky.), 371, a widow was adjudged to be entitled to have dower assigned to her in a ferry.

In Lippincott v. Allender, 27 Iowa, 460, a ferry was declared

to be, if granted for years, personal property, and if granted in fee, real estate.

The Stevens case is cited with approval as establishing that a widow is entitled to dower in a ferry, in 1 Scribner on Dower, 189, and 2 Scribner (74), 599.

So in the case of Conway v. Taylor's Executor, 1 Black, 632, it is said:

> "A ferry franchise is as much property as a rent or any other incorporeal hereditament or chattels or realty. It is clothed with the same sanctity and entitled to the same protection as other property."

And in the same case the following is quoted from 3 Kent's Commentaries, 459: "An estate in such a franchise and an estate in land rest upon the same principle."

The franchise for the operation of this particular ferry granted by Indiana was admitted on all hands to be real property in the case of Mabury v. Louisville & Jeffersonville Ferry Company, 60 Fed. Rep. 649—a case decided by the Circuit Court of Appeals of the Seventh Circuit.

And again, the rights granted for this particular ferry are fully considered in Bowman v. Wathen, 2 McLean, 376, in a very learned opinion by Mr. Justice McLean. This case was affirmed in Bowman v. Wathen, 1 Howard, 189.

As shown above, it was for the acquisition of this particular ferry franchise that substantially the whole capital stock of the Louisville & Jeffersonville Ferry Company was issued. The correlative right which the Ferry Company has to ferry across the river from Louisville to Jeffersonville comes from a rental of the ferry privileges of the city of Louisville, for which the Ferry Company pays an annual compensation.

I.

The Board of Valuation and Assessment were Bound to Value the Indiana Franchise and Deduct it from the Value of the Capital Stock.

The Board of Valuation and Assessment refused to consider this Indiana franchise for any purpose. Under the law governing that Board, it is its duty to ascertain the value of the capital stock of various corporations, including ferry companies. From the value of this capital stock thus found it is its duty to deduct the value of the "tangible property" of the corporation, and this remainder the statute designates as the "value of the franchise." But it has been determined by the Court of Appeals of Kentucky, in the case of Henderson Bridge Company v. Commonwealth (99 Ky., page 634), that this so-called value of franchise is simply the value of the property of the corporation other than its tangible property, and it was upon this theory that the case of the Henderson Bridge Co. v. Kentucky (166 U. S. 151) was affirmed by this court. In the syllabus to that case it is said that the tax in controversy was nothing more than a tax on the intangible property of the company in Kentucky, and was sustained as such by the Court of Appeals.

The same ruling was made in the case of Adams Express Co. v. Kentucky, 166 U. S. 172.

In the opinion in the Henderson Bridge case this court said:

> "It appeared that the bridge company owned 9.46 miles of railroad, and .65 of a mile of siding, making its railroad connections in Indiana, which property was assessed for taxation in that State at $627,660; that the length of the bridge in the two States, measured by feet, was one third in Indiana and two thirds in Kentucky; that the tangible property of the company was assessed in Henderson County, Kentucky, at $649,735.54; that the capital stock of the company was $1,000,000, and that it had issued bonds to the amount of $2,000,000.
>
> "From the evidence before them the Board of Valuation and Assessment placed the value of the company's entire

property at $2,900,000, and deducted therefrom $627,660 for the tangible property assessed in Indiana, which left $2,272,340, of which two thirds, or $1,514,893, was held to be the entire value of the property in Kentucky. From this $649,735.54, the value of the tangible property in Henderson County, was deducted, and the remainder, $865,157.46, was fixed by the Board as the value of the company's franchise."

Again the court said:

"The only franchises treated here as the subject of taxation were those granted by the State of Kentucky. So far as the State of Indiana could be said to have conferred any franchise upon the company, it was a franchise that inhered in that portion of the structure that was within the State of Indiana, the value of which was not included in the tax complained of."

Exactly the opposite of this is true in the case at bar. There is included in this valuation of the so-called franchise the right which the corporation acquired from its grantors to the ferry franchise granted by and under the authority of the State of Indiana.

The learned judge, in delivering the opinion of the Court of Appeals of Kentucky in this case, attempted to meet this argument in the following way:

"If the franchise of the appellant became valuable by the acquisition of tangible or intangible property, or both, the effect is exactly the same, whether it is acquired in Indiana or in Kentucky, or both. It is not the tangible or intangible property in Indiana which the appellant acquired by purchase which is sought to be taxed, but the value of its franchise which has been created in and now exists in Kentucky. We do not think the case of Henderson Bridge Company v. Commonwealth, 99 Ky. 623, is in conflict with the view here expressed. There the Commonwealth only attempted to tax its franchises to low water mark on the Indiana side. This was done because that part of the bridge which was in the State of Indiana was constructed under a charter from the State of Indiana, and presumably held and operated by virtue of it."

If we understand the thought here expressed, it is that if a corporation created by the laws of the State of Kentucky acquires property, such as a ferry franchise, from another State, that property is taxable in Kentucky; not in and of itself so taxable, but taxable because it increases the value of the Kentucky franchise. If this is true, then a railroad, organized under the laws of the State of Kentucky, and owning a line in Indiana, can be taxed in Kentucky upon the value of that line. But if the Kentucky railroad has an Indiana charter, it can not be taxed upon the value of its Indiana line. In the one case the court would hold that the Indiana corporation owned the Indiana franchise and property; whereas, in the other case, it would hold that, as the Kentucky corporation owned the Indiana franchise and the Indiana property, it was taxable in Kentucky.

Under Section 4082 of the Kentucky Statutes an individual or partnership engaged in the business of a ferry company would have an assessment made by the Board of Valuation and Assessment exactly as it would be made in the case of a corporation. Suppose an individual or partnership owned this Indiana franchise and had leased the Kentucky franchise; it surely could not be claimed that the Indiana franchise could be taxed in Kentucky as against this individual or partnership. And no more can it be valued in making an assessment against a corporation.

The opinion of the court is a mere assertion that all property of a corporation organized under the laws of Kentucky can be taxed in Kentucky, it matters not where it is situated and whether it be real or personal property. Such a doctrine, we submit, has never before been announced or even intimated as to real property; and if we are right in our proposition that the Indiana ferry franchise is an incorporeal hereditament, and therefore having its situs in Indiana, it can not be taxed in Kentucky either directly or indirectly.

It is, we suppose, hardly necessary to cite authority to show that one State can not tax real property situated in another State.

In Cooley on Taxation, 2d Ed., page 55, it is said:

> "It has already been seen that persons and property not within the territorial limits of a State can not be taxed by it. In such a case the State affords no protection, and there is nothing for which taxation can be an equivalent. . . . But real property out of the State can not be taxed to the owner within it. While, on the other hand, all real estate of a non-resident is taxable where it is, though the tax will be upon the land merely and will not be a personal charge upon the non-resident owner."

So, in 25 A. & E. Ency. of Law, page 130, it is said:

> "The State may tax land within its limits, whether owned by a resident or non-resident, unless such land is within the recognized exceptions, as where it belongs to an Indian tribe or to the Federal Government. Land is not only to be assessed by the State in which it lies, and by it alone, but it is to be taxed, as a general rule, only in the subdivision of the State in which it is situated, whether the subdivision be a county, town, school district, or other public corporation."

For the State of Kentucky to give an extra territorial operation to its taxing laws, so as to reach property whose situs is in another State, is to deny to the person thus burdened the equal protection of the laws, and is to deprive him of his property without due process of law. If there is any contrary authority to this we do not know it.

This court has, in various cases, considered the subject of taxation by several States of the property of a corporation doing business in all of these States. Thus the Western Union Telegraph Company has its lines extending through many States of the Union. So has the Adams Express Company. So, also, there are various railroad corporations owning lines extending through several States.

The taxing laws of these States have been directed towards the proper assessment of the aliquot part of such unit properties

situated within the territorial limits of the taxing power. This court has held that it is lawful, in determining the value of this aliquot part, to take into consideration the value of the whole property of the corporation, and that this whole property may be fairly and justly apportioned according to its mileage of line, say of railroad or telegraph, or route, as of express companies, in these various States.

In this way it has been held lawful to tax not merely the tangible property which has its situs in one of these States, but the added value to the tangible property given to it by its unity of use.

At the same time, this court said, in Adams Express Company v. Ohio, 166 U. S. 222 (the opinion which may be considered as the summing up of its conclusions by this court upon this general subject) that,

> "It is suggested that the company (Adams Express Company) may have bonds, stocks, or other investments which produce a part of the value of its capital stock, and which have a special situs in other States, but are exempt from taxation. If it has, let it show the fact. Courts deal with things as they are, and do not determine rights upon mere possibilities. If half of the property of the Adams Express Company, which by its own showing is worth $16,000,000 and over, is invested in United States bonds, and therefore exempt from taxation, or invested in any way outside the business of the company, and so as to be subject to purely local taxation, let that fact be disclosed, and then if the State of Ohio attempts to include within its taxing power such exempted property, or property of a different situs, it will be time enough to consider and determine the rights of the company. That if such facts exist they must be taken into consideration by a State in its proceedings under such tax laws as are here presented has been heretofore recognized and distinctly affirmed by this Court. Pittsburgh, Cincinnati, &c., Railway Co. v. Backus, 154 U. S. 421, 443; Western Union Telegraph Co. v. Taggart, 163 U. S. 1, 23; Adams Express Co. v. Ohio, 165 U. S. 194, 227."

In the first of these cases, Pittsburgh Railroad v. Backus, 154 U. S., at pages 443–4, this court assumes that the mileage

apportionment would not be a fair one if special circumstances existed to distinguish between the conditions in the two States, such as "terminal facilities of enormous value in one and not in the other."

In the case at bar it is showed clearly that the Ferry Company did bring to the attention of the Board of Valuation and Assessment its ownership of this Indiana franchise, and that this was an element which the Board was bound to consider in fixing what proportion in value of the whole capital stock was subject to taxation in Kentucky.

The revenue law under which the Board was acting, by Section 4080, required an apportionment if the corporation was a railroad, telegraph, telephone, express, sleeping, dining, palace, or chair car company, and the lines extended beyond Kentucky.

We respectfully submit that this apportionment must be made in the case of a ferry company as well. Such an apportionment was made in the Henderson Bridge case, and a bridge company is no more mentioned in Section 4081 than is a ferry company.

The Court of Appeals, in the opinion by Judge Paynter, says:

> "The Board of Valuation and Assessment fixed the value of the franchise for the corporation as if it conducted all of its business in the territorial limits of the State of Kentucky, not deducting any thing from that value on account of the fact that it exercised the privilege of conveying passengers from Jeffersonville to Louisville, by reason of its acquisition of privileges which were originally granted under the laws of that State."

Again the court said:

> "By virtue of its corporate authority the appellant acquired ferry-boats, the ferry rights within the city of Louisville, which included the right to transport persons and property from Kentucky to Indiana over the Ohio River, and the necessary use of its wharf to carry on that business. It also, by contract (which its charter seems to have authorized it to do), acquired wharf privileges on the Indiana side, and also the right which had been previously granted by

Indiana to transport persons and property from Indiana to Kentucky over the Ohio River. It also owns a park in Indiana. The property thus acquired constituted all of its property, tangible and intangible, in Kentucky and Indiana. Having thus acquired the foregoing property, and having profitably used it, its corporate franchise presumably became of the value fixed by the Board of Valuation and Assessment.

"If the franchise of the appellant became valuable by the acquisition of tangible or intangible property, or both, the effect is exactly the same whether it is acquired in Indiana or in Kentucky, or both. It is not the tangible or intangible property in Indiana which the appellant acquired by purchase, which is sought to be taxed, but the value of its franchise, which has been created in and now exists in Kentucky."

This entirely upsets the whole theory of apportionment which this court has been at such pains to justify, and, under the ruling of the Court of Appeals of Kentucky, the whole of the intangible property of a Kentucky corporation is assessable in Kentucky, it matters not that this intangible property may consist of an incorporeal hereditament, or may be the added value to the tangible property by the use to which the whole property is put.

So that, according to this decison, if the Adams Express Company was incorporated under the laws of the State of Kentucky, it would be competent for Kentucky to value its whole capital stock, and deduct nothing therefrom, except the value of its tangible property situated in the other States where it carried on its business. And the case at bargoes even farther than that, because it justifies the refusal of the assessing officer to deduct the value of the incorporeal hereditanent of the Ferry Company, granted to it by and having its situs in the State of Indiana.

We respectfully submit, therefore, that in no view of the law on this subject can this assessment be supported.

It is proper to say that the Board of Valuation and Assessment, in refusing to ascertain the value of the Indiana ferry franchises, followed the language of the statute, Section 4079,

providing for a deduction of the tangible property only in order to arrive at the value of a corporate franchise. As the Indiana ferry franchise, although an incorporeal hereditament, is not tangible property, the Board followed the statute, and, if the statute is valid, was right in refusing to deduct it. Our argument, of course, is addressed to the proposition that it is unconstitutional for Kentucky to direct the deduction simply of tangible property, and not other property, such as an incorporeal hereditament, which, though it may be intangible property, yet is property, and has its situs outside of the territorial jurisdiction of the State.

II.

The Tax is Void as a Regulation of Interstate Commerce.

In the opinion of the Court of Appeals of Kentucky in this case it is said:

> "The appellant owns certain ferry-boats, which are enrolled at the port of Louisville. It owns certain real estate in the State of Indiana. It has paid its taxes upon its real property in Indiana, and upon its personal property in this State. It has paid its taxes only upon its tangible property. It appears to have no income except the revenue derived from carrying persons and property from one side of the river to the other. The Board of Valuation and Assessment fixes the value of the franchise of the corporation as if it conducted all of its business in the territorial limits of the State of Kentucky, not deducting any thing from that value on account of the fact that it exercised the privilege of conveying passengers from Jeffersonville to Louisville by reason of its acquisition of privileges which were originally granted under the laws of that State.

Again it says:

> "The appellant is domiciled in Kentucky, and the property sought to be taxed has its situs in Kentucky, and, as we have said, there is no attempt to tax the appellant's business, income, or revenue, but its income is alone considered in fixing the value of its franchise."

In the answer in this case it was expressly averred that the Ferry Company had no intangible property except the franchise thereinafter described, which was the franchise granted in Indiana. It was further expressly alleged that the Board of Valuation and Assessment arrived at the value of defendant's franchise by capitalizing its net earnings, and that these net earnings were derived from the carriage of persons and property between the States of Indiana and Kentucky. And this was admitted by demurrer. Indeed, the opinion of the Court of Appeals of Kentucky meets the case squarely, and insists that it is competent for the State to value what it calls the Ferry Company's franchise, by capitalizing the earnings of the Ferry Company, which it derives from interstate commerce. We respectfully submit that the decisions of this court conclusively show that this can not be done.

In Gloucester Ferry Company v. Pennsylvania, 114 U. S. 196, it appeared that there was a ferry company incorporated by the laws of the State of New Jersey, which ran a ferry from the town of Gloucester in that State to the city of Philadelphia in Pennsylvania. The law of Pennsylvania provided that every company or association doing business in Pennsylvania or having capital employed in that State (with certain exceptions) should be subject to and pay into the treasury of Pennsylvania, annually, a tax to be computed thus: If the dividend during any year amounted to 6 or more than 6 per cent, then the tax was to be at the rate of half a mill upon the capital stock. If no dividend was made or declared, or if it should not amount to 6 per cent, then the tax was to be at the rate of 3 mills upon each dollar of the valuation of capital stock, made in accordance with the provisions of another section of the act.

Mr. Justice Field delivered the opinion of this court, and held that the tax could not be exacted. We forbear to quote from this opinion, because it would be difficult to select passages

from it. The whole opinion is a demonstration that such a tax is a regulation of interstate commerce, and invalid.

It is to be observed in this case that the corporation which the State of Pennsylvania was endeavoring to tax was a New Jersey corporation. But this is not a material circumstance, as is proved by the next case which we shall cite, viz: Philadelphia & Southern Steamship Co. v. Pennsylvania, 122 U. S. 326.

In that case the State of Pennsylvania endeavored to lay a tax upon the gross receipts of a steamship company incorporated under its laws. It was held that as these receipts were derived from the transportation of persons and property by sea between different States, and to and from foreign countries, this tax was a regulation of interstate and foreign commerce in conflict with the exclusive powers of Congress under the Constitution, and void.

This is a very full discussion of this subject, and again we forbear to make extracts, as the whole opinion must be read in order to see with what force it bears upon the case at bar.

In the case of the Covington and Cincinnati Bridge Company v. Kentucky, 154 U. S. 204, the question was as to the right of the State of Kentucky to regulate the tolls upon a bridge over the Ohio River uniting the cities of Covington, Kentucky, and Cincinnati, Ohio. This court held that such an act was beyond the power of the State of Kentucky, and distinctly held that a bridge as well as a ferry boat is a vehicle of commerce; and further held that it did not follow that, because a State might authorize a ferry or bridge from its own territory to that of another State, it might regulate the charges upon such bridge or ferry.

In Adams Express Company v. Ohio, 166 U. S. 185, Mr. Justice Brewer, on page 218, said:

> "Again and again has this court affirmed the proposition that no State can interfere with interstate commerce through

> the imposition of a tax, by whatever name called, which is in effect a tax for the privilege of transacting such commerce."

In the case at bar, it is true that Kentucky authorized this corporation to be a ferry company, and further authorized it to issue its capital stock in payment for the Indiana ferry franchise. But this charter did not make the corporation a ferry company. It was compelled to otherwise acquire the right to transport persons and property across the Ohio River.

How far the State could, under its police powers, regulate this ferry it is not pertinent here to inquire. There is certainly a difference between the right to acquire property and the right to property actually acquired. This corporation is given corporate life by the act of the Legislature of Kentucky. Having this corporate right, it acquired by conveyance this Indiana ferry franchise, and by lease this Kentucky ferry franchise. It has paid to Kentucky taxes on all of its property in Kentucky. It pays to the city of Louisville annually a rental for the ferry privilege leased to it by the city of Louisville. It has acquired for value—viz., the issue of its stock—the Indiana ferry franchise. Having acquired these properties it derives a certain revenue from them, but this revenue is derived entirely from interstate commerce.

This being true, when the Ferry Company paid to the State of Kentucky the tax upon all property, tangible and intangible, which it owned within the situs of its domicile, there was nothing more which the State would have the right to tax.

It is admitted, as we have shown above, that the present exaction comes alone from an effort by the tax assessors to capitalize income derived by the corporation from interstate commerce. We submit that there is no difference, in principle, between such a tax and the one declared by this court to be invalid, in the Gloucester Ferry case, 114 U. S. 206, and in the Philadelphia Steamship case, 122 U. S. 326.

III.

The Privilege Here Attempted to Be Taxed is One Derived from the United States, and Hence is not Taxable by the State.

We have heretefore assumed in this brief that it was entirely within the power of the States of Kentucky and Indiana to grant to the Ferry Company the right to operate a ferry between the cities of Louisville and Jeffersonville. Obviously, it is the profitable use of this right which the State is attempting here to tax. It is admitted that the Ferry Company has paid to the State of Kentucky a tax upon all of its tangible property having a situs in Kentucky.

What other property has the Ferry Company taxable by that State? It is answered that the value of the Ferry Company's tangible property is vitalized by the way in which its tangible property is used, and it is this added value that is attempted to be reached by the Board of Valuation and Assessment.

But, we submit, this added value does not come from Kentucky, but is held by the Ferry Company under the Constitution and Laws of the United States. It is true that Kentucky granted an act of incorporation to the Ferry Company. It is also true that this act of incorporation—this right to be a corporation—is not a franchise that Kentucky attempts to tax. It does not attempt to lay any tax upon the franchise to be a corporation. This has been expressly decided by the Court of Appeals of Kentucky in the case of the Louisville Tobacco Warehouse Company v. Commonwealth, 20 Ky. Law Rep. 1747, where the matter is fully considered in the principal opinion by Judge DuRelle, and in the concurring opinion by Judge Hobson.

What other franchise does the Ferry Company derive from the State of Kentucky? Does it derive from that State the right

to navigate the Ohio River and to transport persons and property across a navigable stream which is the boundary between two States?

The Ferry Company has obtained its right to land in Louisville by a lease from the city of Louisville, acting through the Commissioners of the Sinking Fund, and it pays an annual rental besides wharfage. It derives its right to land in Indiana by having purchased the ferry franchises which are described in a former part of this brief. The only other right which it has is to navigate the river. This right, we respectfully submit, is one which is derived from the United States, and to attempt to put any tax or burden upon this right is an attempt to regulate commerce between the States.

The case of Gibbons v. Ogden, 9 Wheaton, 1, was a contest over what was in effect a ferry between New York City and Elizabethtown, N. J. In that case, Chief Justice Marshall remarked that laws respecting ferries as well as inspection laws, quarantine laws, health laws, and laws regulating the internal commerce of the States are component parts of an immense mass of legislation, embracing every thing within the limits of the State not surrendered to the General Government. But it is to be observed in that case that he held the law of New York, attempting to regulate this ferry between New York City and Elizabethtown, void.

In Gloucester Ferry Company v. Pennsylvania, 114 U. S. 196 (which has already been referred to), there was under consideration the right of Pennsylvania to tax a ferry between Gloucester, New Jersey, and the City of Philadelphia. It was held that this could not be done; and one clause of the syllabus (9) is as follows:

> "The transportation of passengers and freight for hire by a steam ferry, across the Delaware River from New Jersey to Philadelphia, by a corporation of New Jersey, is interstate commerce which is not subject to exactions by the State of Pennsylvania."

In that case, Mr. Justice Field, delivering the opinion of the court, referred to Judge Marshall's statement in regard to laws respecting ferries, but said that this language plainly referred to ferries entirely within the State, and not to ferries transporting passengers and freight between the States and a foreign country; that as Congress had passed various laws respecting ferries between a State and a foreign State, and between two States, it meant that such commerce should be free from State exactions. Thus the court said:

> "Such a ferry is a means, and a necessary means, of commerical intercourse between the States bordering on their dividing waters, and it must, therefore, be conducted without the imposition by the States of taxes or other burdens upon the commerce between them."

In Covington Bridge Company v. Kentucky, 154 U. S. 304, the court, in holding that the State of Kentucky could not regulate the rates of toll across an interstate bridge, likened such interstate bridge to an interstate ferry. The court said, in reference to the case of Conway v. Taylor's Executor, 1 Black, 603:

> "In that case a ferry franchise on the Ohio was held to be grantable, under the laws of Kentucky, to a citizen of that State who was a riparian owner on the Kentucky side. It was said not to be necessary to the validity of the grant that the grantee should have the right of landing on the other side or beyond the jurisdiction of the State. The opinion, however, did not pass upon the question of the right of one State to regulate the charge of ferriage, nor does it follow that because a State may authorize a ferry or bridge from its own territory to that of another State, it may regulate the charges upon such bridge or ferry. A State may undoubtedly create corporations for the purpose of building and running steamships to foreign ports, but it can hardly be claimed that an attempt to fix a scale of charges for the transportation of persons or property to and from such foreign ports would not be a regulation of commerce and beyond the constitutional power of the State. It is true the States have assumed the right, in a number of instances, since the adoption of the Constitution, to fix the rates of toll

upon interstate ferries and bridges, and perhaps, in some instances, have been recognized as having authority to do so by the courts of the several States, but we are not aware of any case in this court where such right has been recognized."

In Philadelphia Company v. Pennsylvania, 122 U. S. 326, which we have before adverted to, this court declared unconstitutional a law of the State of Pennsylvania attempting to levy a tax on receipts by a steamship company organized under the laws of the State of Pennsylvania, where such receipts were derived from interstate and foreign commerce. And this was upon the distinct ground, as we understand it, that the right of the steamship company to conduct interstate commerce or foreign commerce was derived, not from the State, but from the United States.

It is difficult to make a selection from the many cases decided by this court holding that commerce between the States must be free from State exactions; we may refer, however, to Hall v. De Cuir, 95 U. S. 485; Moran v. New Orleans, 112 U. S. 69; Harmon v. Chicago, 147 U. S. 396.

In the case at bar it is alleged in the answer and taken as true that the boats of the Ferry Company are enrolled at the port of Louisville. It would be tedious to point out the many regulations which Congress has made in reference to steam craft navigating the waters of the United States, including in these regulations ferry-boats. We are not here concerned with the question as to whether, as long as Congress does not act, there may not be a police power in the States bordering upon the Ohio and other navigable waters; but this, as has been recognized in many cases in this Court, is an entirely different question from that involved in the assertion by the State of a right to lay a tax upon the privilege of navigating such waters.

So, in Louisville & Nashville Railroad v. Kentucky, 161 U. S. 701, this court said:

> "But little need be said in answer to the final contention of the plaintiff in error, that the assumption of a right to forbid the consolidation of parallel and competing lines is an interference with the power of Congress over interstate commerce. The same remark may be made with respect to all police regulations of interstate railways. All such regulations interfere indirectly, more or less, with commerce between the States, in the fact that they impose a burden upon the instruments of such commerce, and add something to the cost of transportation, by the expense incurred in conforming to such regulations. These are, however, like the taxes imposed upon railways and their rolling stock, which vary more or less, according to the policy of the State within which the roads are operated, but are still within the competency of the legislature to impose. It is otherwise, however, with respect to taxes upon their franchises and receipts from interstate commerce, which are treated as a direct burden."

This case is essentially different from the Henderson Bridge case above referred to, in 166 U. S. 150, this Court, in that case, saying:

> "Clearly the tax was not a tax upon the interstate business carried on, over or by means of the bridge, because the Bridge Company did not transact that business. That business was carried on by the persons and corporations which paid the Bridge Company tolls for the privilege of using the bridge."

In the case at bar the commerce is carried on by the Ferry Company, and the tax attempted to be levied by the State of Kentucky is confessedly based upon the receipts from that commerce. In other words, it is not denied by the Court of Appeals of Kentucky that the Ferry Company, having paid all taxes due by it on its tangible property situated in Kentucky, is now asked to pay a further tax, which is arrived at by capitalizing the net earnings derived by the Ferry Company wholly from interstate commerce, and deducting therefrom the value of its tangible property.

We can hardly imagine a more direct way of levying a tax upon the gains from interstate commerce.

For this reason, also, we insist that the tax here attempted to be collected is contrary to the Constitution of the United States.

In conclusion, we desire to call the attention of the Court to the fact that all these questions were brought to the attention of the Board of Valuation and Assessment, and that they refused to enter into or consider them, or to allow the assessment to be at all affected by them.

We submit that the judgment of the court below should be reversed, with directions to dismiss the petition of the Commonwealth.

Respectfully,

ALEXANDER POPE HUMPHREY,

For Plaintiff in Error.

APPENDIX.

An Act to Incorporate the Louisville and Jeffersonville Ferry Company.

Be it Enacted by The General Assembly of the Commonwealth of Kentucky:

1. That Z. M. Shirley, W. C. Hite, John B. Smith, Howard Johnson, and R. H. Woolfolk, are hereby created a body corporate, by the name of "The Louisville and Jeffersonville Ferry Company"; and by that name shall have perpetual succession, and may sue and be sued, contract and be contracted with, purchase and hold all such property, real and personal, as may be necessary or convenient to enable such corporation to carry on the business of ferrying freight and passengers and vehicles over the Ohio River, and generally to do and perform all such acts as an individual might do and perform in the premises.

2. The capital stock of said company shall consist of two thousand shares of stock of the par value of one hundred dollars each.

3. The business of said corporation shall be controlled by five directors, to be chosen annually, and by a president, to be elected by them, who may or may not be one of their number, as they may determine.

4. The corporators above named shall act as directors for one year from the time they shall accept this charter, and as such shall have all the powers granted herein to the directors.

5. There shall be elected by the directors a secretary and such other officers as their by-laws may direct, who shall hold their offices respectively until the election of a new board of directors, and until their successors are elected and qualified.

6. The manner, time, and place of holding elections, and giving notice thereof, of subscribing, paying, and transferring stock,

of compensating officers, and generally of conducting and managing the business and corporate affairs of said corporation, shall be regulated by by-laws to be adopted by the directors, who are hereby authorized to enact and repeal such by-laws at pleasure; and the same while in force shall have the same force and effect as if enacted herein, provided they are not inconsistent with the Constitution and laws of the State.

7. Said corporation may purchase from any existing ferry companies or associations any ferry-boats, wharves, and ferry franchises for any ferry or ferries between Louisville and Jeffersonville, and upon the purchase of all such existing franchises shall have the right to carry on and conduct a ferry or ferries between said cities.

8. Said corporation may accept such boats and franchises, and wharves and other property in payment of stock subscribed, and at such prices as may be agreed on.

9. Said company shall have a lien to secure their ferriage due upon any horses or vehicles ferried by them, and may refuse to permit such horses or vehicles to leave their boats until such ferriage is paid, or may assert their lien by suit in the Louisville Chancery Court, without regard to the amount due or claimed to be due.

10. This act shall continue in force fifty years, and is declared to be in force from and after its passage; but the right to amend or change this charter, or any part thereof, is expressly reserved.

Approved March 16, 1869.

Provisions of Kentucky Statutes as to Board of Valuation and Assessment.

Section 4077. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge

company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation, or association, also every other corporation, company, or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town, and taxing district where its franchise may be exercised. The Auditor, Treasurer, and Secretary of State are hereby constituted a Board of Valuation and Assessment for fixing the value of said franchise, except as to turnpike companies, which are provided for in Section 4095 of this article. The place or places where such local taxes are to be paid by other corporations on their franchise, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the Board of Valuation and Assessment, and for the discharge of such other duties as may be imposed on them by this act. The Auditor shall be Chairman of said Board, and shall convene the same from time to time, as the business of the Board may require.

Section 4078. In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies, and associations mentioned in the next preceding section, except banks and trust companies, whose statements shall be filed as hereinafter required by Section 4092 of this article, shall, annually, between the 15th day of September and the 1st day of October, make and deliver to the Auditor of Public Accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager or other chief officer or agent, in

such form as the Auditor may prescribe, showing the following facts, viz:

The name and principal place of business of the corporation, company, or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the 15th day of September of the year in which the statement is required to be made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income, including interest on investments and incomes from all other sources for twelve months next preceding the 15th day of September of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale; and such other facts as the Auditor may require.

Section 4079. Where the line or lines of any such corporation, company, or association extend beyond the limits of the State or county the statement shall, in addition to the other facts hereinbefore required, show the length of the entire lines operated, owned, leased, or controlled in this State, and in each county, incorporated city, town, or taxing district, and the entire line operated, controlled, leased, or owned elsewhere. If the corporation, company, or association be organized under the laws of any other State or government, or organized and incorporated in this State, but operating and conducting its business in other States as well as in this State, the statement shall show the following facts in addition to the facts hereinbefore required: The gross and net income or earnings received in this State and out of this State, on business done in this State, and the entire gross receipts

of the corporation, company, or association in this State and elsewhere during the twelve months next before the 15th day of September of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchises to be taxed, the said Board may excuse the officer from answering such questions; Provided, That said Board, from said statement, and from such other evidence as it may have, if such corporation, company, or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company, or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise, subject to taxation as aforesaid.

Section 4080. If the corporation, company, or association be, organized under the laws of any other State or government, except as provided in the next section, the Board shall fix the value of the capital stock, as hereinbefore provided, and will determine, from the amount of the gross receipts of such corporation, company, or association, in this State and elsewhere, the proportion which the gross receipts in this State, within twelve months next before the 15th day of September of the year in which the assessment was made, bear to the entire gross receipts of the company, the same proportion of the value of the entire capital stock, less the assessed value of the tangible property assessed, or liable to assessment, in this State, shall be the correct value of the corporate franchise of such corporation, company, or association for taxation in this State.

Section 4081. If the corporation organized under the laws of this State, or of some other State or government, be a railroad, telegraph, telephone, express, sleeping, dining, palace, or chair car company, the lines of which extend beyond the limits of this

State, the said Board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this State, bears to the total length of the lines owned, leased, or controlled in this State and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State; and such corporate franchise shall be liable to taxation in each county, incorporated city, town, or district through, or into which such lines pass, or are operated, in the same proportion that the length of the line in such county, city, town, or district bears to the whole length of lines in the State, less the value of any tangible property assessed or liable to assessment, in any such county, city, town, or taxing district.

Section 4082. Whenever any person or association of persons, not being a corporation, nor having capital stock, shall in this State engage in the business of any of the corporations mentioned in the first section of this article, then the capital and property, or the certificates or other evidences of the rights or interests of the holders thereof in the business or capital and property employed therein, shall be deemed and treated as the capital stock of such person or association of persons for the purposes of taxation and all other purposes under this article, in like manner as if such person or association of persons were a corporation.

Section 4083. It shall be the duty of the Auditor, immediately after fixing such values by said Board, to notify the corporation of the fact; and all such corporations shall have thirty days from the time of receiving the notice to go before such Board and ask a change of the valuation, and may introduce evidence, and the Chairman of the Board is hereby authorized to summon and swear witnesses, and after hearing such evidence, the Board may change the valuation as it may deem proper, and the action of the Board shall be final.